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Supreme Court, U.S.
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NO. 03-1597

IN THE SUPREME COURT OF THE UNITED STATES

GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, SAM REED, SECRETARY OF STATE OF THE STATE OF WASHINGTON, AND THE STATE OF WASHINGTON,

Petitioners,

v.

MUHAMMAD SHABAZZ FARRAKHAN, AL KAREEM SHADEED, RAMON BARRIENTES, CLIFTON BRICENO, MARCUS PRICE, AND TIMOTHY SCHAAF.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

CHRISTINE O. GREGOIRE
Attorney General
William Berggren Collins
Senior Assistant Attorney General
Counsel of Record
Daniel J. Judge
Jeffrey T. Even
Assistant Attorneys General
P. O. Box 40100
Olympia, WA 98504-0100
360-753-6245

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REPLY TO BRIEF IN OPPOSITION

The majority of Respondents' Brief In Opposition is devoted to explaining why the decision below is correct. While we disagree with respondents' analysis, this reply will focus on the reasons the Court should grant the petition and resolve the parties' dispute about the merits of case.

1. There Is A Conflict Among The Circuits On An Important National Issue

In the petition, we explained that this case involves a conflict among the circuits on an important national question—whether the Voting Rights Act, 42 U.S.C. § 1973, allows individuals to challenge state laws that disenfranchise them based upon a felony conviction. Pet. 12-16, 20-23. Respondents do not dispute that this is an important national question. Instead, they suggest that the conflict is overstated and that the question should be allowed to percolate in the lower courts before this Court takes up the issue. Br. Opp. 9-11.

Respondents try to downplay the conflict between the decision below and *Muntaqim v. Coombe*, 366 F.3d 102 (2d Cir. 2004). According to respondents, "while the Second Circuit and the court below ultimately reached different results, their rationales are not directly in conflict to an extent that warrants this Court's intervention". Br. Opp. 10. Respondents are in error. The conflict is stark. In *Muntaqim*, the Second Circuit dismissed respondents' Voting Rights Act claim. The decision below did not. These two decisions cannot be reconciled.

With regard to their claim that review is premature, respondents point out that the Court has denied petitions when more circuits were involved in the conflict. Br. Opp. 10. However, the Court has no hard and fast rule about when a conflict needs to be resolved. For example, in *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 231 (2003), the Court granted review to resolve a disagreement between the majority and dissenters in an en banc decision of the Ninth Circuit. Here, the importance of the question counsels against delay. As we explained in the petition, forty-eight states have some form of felon disenfranchisement law, and a number of cases have been filed challenging those laws. Pet. 22. Whether the Voting Rights Act applies to such claims is a key threshold question that needs to be definitively answered by this Court. In this respect, we note that the Second Circuit's decision in *Muntaqim*—holding that the Voting Rights Act does not apply to felon disenfranchisement claims—is currently pending before the Court on a petition for a writ of certiorari. *Jalil Abdul Muntaqim a/k/a Anthony Bottom v. Philip Coombe, Antony Annucci, Louis F. Mann* U.S.S.C Docket No. 04-175.

Not only is there conflict between circuits, but there is disagreement within circuits about this question. The decision below came after a strong dissent from the denial of rehearing en banc. The Eleventh Circuit decision in *Johnson v. Governor of the State of Florida*, 353 F.3d 1287 (11th Cir. 2003)—holding that the Voting Rights Act applies to felon disenfranchisement claims—came after a strong dissent. And now that rehearing en banc has been

granted in *Johnson*, the decision has been withdrawn. *Johnson v. Governor of the State of Florida*, 2004 WL 1609101 (11th Cir. July 20, 2004). The granting of the petition for rehearing en banc demonstrates the continuing confusion in the lower courts about this important question.

The Second Circuit correctly concluded in *Muntaqim*, "this panel believe[s] that the issues presented in this case are significant and, in light of the differing perspectives among and within the courts of appeals, warrant definitive resolution by the United States Supreme Court". *Muntaqim*, 366 F.3d at 130.

2. The Question Presented In The Petition Was Presented Below

Respondents also suggest that the Court should deny the petition because petitioners failed to raise their plain statement argument at the appellate level. Br. Opp. 7-8. Respondents argue that when an issue has not been decided by the court of appeals, review is routinely denied. Respondents' argument confuses issues raised in the court of appeals and arguments used to support the resolution of those issues. In this case, the question presented does not involve the plain statement rule. The question presented asks:

> "Whether the Voting Rights Act, 42 U.S.C. § 1973, which prohibits voter disqualification based on race or color, allows an individual to challenge a state law that disenfranchises individuals based upon a felony conviction." Pet. i.

Petitioners argued to the Ninth Circuit that the Voting Rights Act was not intended to prohibit felon disenfranchisement. Brief Of Appellees at 9-13, *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003), App. Pet. 1a. And petitioners expressly raised the plain statement rule. *Id.* 13 n.3. The Ninth Circuit's decision below expressly resolved this issue against petitioners. *Farrakhan*, App. Pet. 13a ("we agree with the district court that [respondents'] claim of vote denial is cognizable under Section 2 of the VRA").

The plain statement rule is not the question presented in this case. Rather, it is an argument supporting petitioners' claim that the question presented should be resolved in petitioners' favor—that the Voting Rights Act does not allow individuals to challenge their disenfranchisement based on a felony conviction. The Court does not require a petitioner to make exactly the same arguments in the lower courts that are made before this Court. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("Our traditional rule is that once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below. Lebron's contention that Amtrak is part of the Government is in our view not a new claim within the meaning of that rule, but a new argument to support what has been his consistent claim: that Amtrak did not accord him the rights it was obliged to provide by the First Amendment.") (citations omitted) (internal punctuation omitted). *PGA Tour, Inc., v. Martin*, 532 U.S. 661, 678 n.27 (2001) ("Martin complains that petitioner's failure to make

this exact argument below precludes its assertion here. However, the Title III coverage issue was raised in the lower courts, petitioner advanced this particular argument in support of its position on the issue in its petition for certiorari, and the argument was fully briefed on the merits by both parties. Given the importance of the issue, we exercise our discretion to consider it.").

The question presented is properly before the Court.

3. Review Of This Case Is Not Premature

Respondents also suggest that review is premature because the decision below is interlocutory. Br. Opp. 11-13. Review is not premature for two reasons. First, this case falls within the exception to the Court's general policy of reviewing final decisions. The Court will review judgments that are not final if the issue is "fundamental to the further conduct of the case". *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947) (citation omitted) (internal punctuation omitted). One of the issues the Court has determined to be fundamental is the jurisdiction of the federal court. Thus, in *Land*, the fundamental issue was whether the plaintiff's case should be dismissed because the action was against the United States. *Id.* at 734. *Accord Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949) ("The judgment of the Court of Appeals was not a final one, but we considered it appropriate for review here since, in our view, the jurisdictional issue was 'fundamental to the further conduct of the case.'"). This case presents the same kind of fundamental jurisdictional

issue—whether a claim of felon disenfranchisement can go forward under the Voting Rights Act.

Second, there is no benefit to the Court in delaying consideration of the case. The question of the scope of the Voting Rights Act is an issue of law, so further development of the record below will not assist the Court in resolving the case.

4. Conclusion

For all of the foregoing reasons, petitioners respectfully request their petition for certiorari be granted.

Respectfully submitted.

CHRISTINE O. GREGOIRE
Attorney General
William Berggren Collins
Senior Assistant Attorney General
Counsel of Record
Daniel J. Judge
Jeffrey T. Even
Assistant Attorneys General
P. O. Box 40100
Olympia, WA 98504-0100
360-753-624

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